FUSING CONSTRUCTION SDN BHD

v.

EON FINANCE BHD & ORS AND ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEALS NOS: S-02-552-1997 & Q-02-553-1997]
13 MARCH 2000

LAND LAW: *Ownership - Registered proprietor - Beneficial ownership in dispute - Illegal transaction*

TRUSTS: *Express trust - Creation - Certainty of subject matter - Finding of facts - Deception on third party - Third party is public authority*

These appeals revolve around the dispute concerning two pieces of properties, one in Tawau and one in Limbang. The properties were registered in the name of Fusing Construction Sdn Bhd ('Fusing'). They were leased to Eon Bank Berhad ('Eon Bank') and Eon Finance Berhad ('Eon Finance') respectively. At the expiration of the lease, Fusing brought an action for vacant possession and seek a declaration that it was a registered and beneficial owner of both properties. Eon Bank and Eon Finance counterclaimed that they were the beneficial owner of the respective properties. In the Limbang action, the trial judge found for Fusing on the ground that although there had been a declaration of trust but it had not been evidence in writing and was therefore unenforceable by reason of the Statute of Frauds. However, in Tawau action the trial judge found against Fusing. The issues raised in the appeals are, *inter alia*, (a) whether an express trust had been created; and (b) whether the express trust, if existed, is illegal and therefore unenforceable.

Held:
Per Gopal Sri Ram JCA

[1] Having regard to the peculiar circumstances in which the trust was formulated in the present case, there was sufficient certainty in respect of the subject matter of the trust.

[2] Since it was a finding of pure facts based on the credibility of witnesses to decide whether there was ample evidence to establish the creation of an express trust, the appellate court is always very reluctant to disturb such findings of facts.

[3] Fusing did not have to rely upon its complicity in the illegal transaction to establish title. It is already the registered proprietor and it is asserting that rights of registered proprietorship.

[4] In view of the facts of this present case, it is not a case of statutory illegality, thus the Statute of Frauds point is purely academic and is a non issue.

[First appeal allowed, counterclaim dismissed; second appeal dismissed, dismissal of counterclaim upheld.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan-rayuan ini berkisarkan pertikaian mengenai dua buah hartanah, satu di Tawau dan satu lagi di Limbang. Hartanah-hartanah tersebut didaftarkan dibawah nama Fusing Construction Sdn Bhd ('Fusing') dan masing-masingnya dipajakkan kepada Eon Bank Berhad ('Eon Bank') dan Eon Finance Berhad ('Eon Finance'). Selepas tamat tempoh pajakan, Fusing mengambil tindakan milikan kosong dan memohon satu deklarasi bahawa ia adalah pemilik berdaftar dan benefisial kedua-dua hartanah tersebut. Eon Bank dan Eon Finance membuat tuntutan balas yang merekalah masing-masingnya pemilik benefisial hartanah tersebut. Didalam tindakan di Limbang, hakim bicara berpihak kepada Fusing atas alasan bahawa walaupun terdapat satu deklarasi amanah tetapi ianya tidak bertulis, maka ia tidak boleh dikuatkuasakan disebabkan oleh Statute of Frauds. Manakala didalam tindakan di Tawau, hakim bicara tidak berpihak kepada Fusing. Isu-isu yang dibangkitkan dalam rayuan-rayuan ini adalah, (a) samada amanah nyata ujud; dan (b) samada amanah nyata, jika ujud, adalah haram dan dari itu tidak dapat dikuatkuasakan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Setelah mengambil kira keunggulan keadaan di mana amanah ini dirumuskan, terdapat kepastian yang memadai mengenai halperkara amanah ini.

[2] Memandangkan ini adalah pendapat mengenai fakta semata yang didasarkan oleh kebolehpercayaan saksi-saksi untuk memutuskan samada terdapat keterangan yang mencukupi untuk membuktikan keujudan amanah nyata, mahkamah rayuan selalunya enggan untuk menganggu pendapat sedemikian.

[3] Fusing tidak perlu bergantung kepada kesulitan transaksi yang haram untuk memantapkan hakmilik. Ia adalah pemilik yang berdaftar dan ia menuntut hak-hak seorang pemilik berdaftar.

[4] Berdasarkan fakta-fakta, kes ini bukanlah satu kes mengenai kepenyalahan undang-undang statut, dari itu pokok perbincangan mengenai Statute of Fraud hanyalah satu perbincangan akademik dan bukanlah satu isu.

[Rayuan pertama dibenarkan, tuntutan balas ditolak; rayuan kedua ditolak, penolakkan tuntutan balas disahkan.]

Case(s) referred to:
Amar Singh v. Kulubya [1964] AC 142 ***(foll)***
Brown & Root (Labuan) Sdn Bhd v. Pada Sdn Bhd [1987] 1 CLJ 229 ***(foll)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd [1990] 1 CLJ 675 ***(foll)***
Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(refd)***
Darlington Borough Council v. Wiltshier Northern Ltd [1995] 3 All ER 895 ***(refd)***
Fitzgerald v. LJ Leonhardt Pty Ltd [1997] 189 CLR 215 ***(refd)***
HL Bolton v. T Graham [1957] 1 QB 159 ***(refd)***
Knight v. Knight [1840] 3 Bev Rep 148 ***(refd)***
Lori (M) Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 ***(refd)***
Nelson v. Nelson [1995] 184 CLR 538 ***(dist)***
Suntoso Jacob v. Kong Liao Ming [1986] 2 MLJ 170 ***(foll)***
Tinsley v. Milligan [1993] 3 All ER 65 ***(refd)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd & Ors [1978] 139 CLR 410 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 67
Contracts Act 1950, s. 24

(Civil Appeal No: S-02-552-97)
For the appellant - Cecil Abraham (Bharti Seth & Roderic Fernandez with him); M/s Shelley Yap Leong Tseu Chong Chia & Co
For the respondents - Mekanda Singh Sandhu; M/s Robin Chng & Partners

(Civil Appeal No: Q-02-553-97)
For the appellant - Wong Ho Leng; M/s Wong Ho Leng & Co
For the respondent - Cecil Abraham (Bharti Seth & Roderic Fernandez with him); M/s Ee & Lim

Reported by Izzaty Izzuddin

JUDGMENT

Gopal Sri Ram JCA:

There are two appeals before us. In the first, Fusing Construction Sdn Bhd ("Fusing") is the appellant. Eon Finance Bhd ("Eon Finance"), Sia Kie Sung ("Sia") and Eon Bank Bhd ("Eon Bank") are the respondents in the first appeal. In the second appeal, Eon Bank is the appellant and Fusing is the respondent. Both appeals arise out of a trial of two suits that were jointly tried at Kota Kinnabalu. One of these was filed in the High Court at Tawau and the other at the High Court at Limbang, Sarawak.

The facts and background relating to these appeals are sufficiently set out in the judgment of the learned judge and we find it unnecessary to regurgitate them here. In a nutshell, the dispute between the parties centres around two pieces of property of which Fusing is the registered proprietor. Eon Finance occupies the property in Tawau (the subject matter of the Tawau suit) and Eon Bank occupies the property in Limbang (the subject matter of the Limbang action).

According to the facts as found by the learned judge, which we accept without hesitation, these two properties were acquired through the assistance of Sia for the purpose of portraying to Bank Negara an impression that Eon Finance and Eon Bank were engaged in a genuine loan transaction. The true picture was that they were buying the respective properties: the one in Limbang and the other in Tawau. The learned judge summed up what actually happened in the following words:

> The 1st Defendant, formerly known as Kong Ming Finance, was sometime in May 1983 given approval by the Central Bank to set up a branch in Tawau while the 3rd Defendant, formerly known as Kong Ming Bank Berhad and the holding company of the 1st Defendant, was also allowed to set up a branch in Limbang. The evidence coming out of the defence shows that there was then in existence a directive of the Central Bank that a financial institution must maintain a certain capital adequacy ratio. Though the details of this requirement are not available, it can be assumed that any deployment of the capital of the 1st Defendant or the 3rd Defendant for purchase of the two properties would adversely affect the said capital adequacy ratio.
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> It appears that sometime in 1982, the 3rd Defendant employed a scheme to get around this requirement. The scheme involved purchasing property needed to set up a branch of the 1st Defendant or of the 3rd Defendant with funds provided by the 3rd Defendant but making the transaction appear as if the fund was a loan by the 1st Defendant and thus no depletion of capital was apparent. It was sometime in May 1983 that a decision was made to employ the said scheme to purchase properties in Tawau and Limbang in order to set up the branches for the 1st Defendant and for the 3rd Defendant. It was in pursuance of this scheme that money was given to the 2nd Defendant who paid for the purchase of the two properties and had them registered in the name of the Plaintiff. The Plaintiff was then supposed to charge them to the 1st Defendant for a loan to repay the 3rd Defendant through the conduit of the 2nd Defendant. The Plaintiff was also supposed to lease the properties to the 1st Defendant and the 3rd Defendant respectively and then to use the rentals to repay the loan secured by the charges over the two properties. As events turned out, the charges over the two properties were not executed through the properties were purchased and registered in the name of the Plaintiff and the leases created.

The learned judge found no difficulty in appreciating the true nature of the transaction. For this is what he said about it:

> In my view it is not difficult to see why. One reason was to disguise the scheme by employing as circuitous a path as possible to channel the fund for the purchase of the properties so as to give it some semblance that the fund was a loan to the 2nd Defendant rather than for buying the properties.

Despite this finding the learned judge came to the conclusion that there was nothing wrong with the transaction. We will say more about this later in the judgment.

To return to the narrative, the properties were registered in the name of Fusing and were leased, the one to Eon Finance and the other to Eon Bank. Each lease was for ten years. After the expiry of these leases, Fusing brought an action for vacant possession and also for a declaration that it was not only the registered proprietor but also the beneficial owner of both properties. In respect of each suit, Eon Finance and Eon Bank respectively mounted a counterclaim seeking a declaration that each was the beneficial owner of the respective properties. It relied on the fact pattern elucidated by the learned judge in his judgement, to which we have already referred, as constituting the basis of the beneficial ownership. After a trial at which the witnesses were called, the learned judge found for Fusing in the Limbang action on the sole ground that there had been a declaration of trust which had not been evidenced in writing and was therefore unenforceable by reason of the Statute of Frauds which the learned judge accepted, applied to the State of Sarawak. The learned judge, however, found against Fusing in the Tawau action. He dismissed its action and granted the counterclaim in favour of Eon Bank.

Before the learned judge, there were three issues raised, all of which were argued before us. The first issue is whether, having regard to the facts and circumstances of the case, an express trust had been created. The second issue is whether the learned judge was right in holding that the Statute of Frauds applied in the State of Sarawak but did not apply in the State of Sabah. The third issue is whether the express trust, if any, is illegal and therefore unenforceable. For the purposes of the present appeal, we find it sufficient to address the first and third issues.

Taking the first issue, the learned judge found abundant evidence to establish an express trust in favour of both Eon Bank and Eon Finance in respect of each of the disputed properties. He accepted without question the evidence of Lau Gah Liew (DW8) as establishing the existence of an express trust in favour of Eon Finance and Eon Bank. This is a finding of pure fact based on the credibility of witnesses. And having regard to the opposing lines of evidence led before the learned judge, he was entirely correct in preferring the evidence of one set of witnesses to another. Indeed the law authorises him so to act. He has given his reasons for such preference. This court is always very slow to disturb such findings of fact.

Upon an occasion such as the present, we would do well to recall the words of Lord Shaw in *Clarke v. Edinburgh Tramways Co* [1919] SC (HL) 35 at p. 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that **quite irrespective of whether the judge makes any observations with regard to credibility or not**. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment. (emphasis added.)

Accordingly, we must reject the arguments of Mr Cecil Abraham, of counsel for Fusing before us, that the learned judge had misdirected himself upon the creation of an express trust. Mr Abraham has argued that even if the evidence of DW8 is accepted *in toto*, the three certainties formulated by Lord Langdale MR in *Knight v. Knight* [1840] 3 Bev Rep 148 at 173 had not been met. Those three certainties are:

(i) certainty of words used to create the trust;

(ii) certainty of subject matter; and

(iii) certainty of beneficiaries

It has been strenuously argued that the second requirement namely, certainty as to the subject matter of trust, was lacking in the present case because the properties in question had not been identified at the time when the trust was decided upon. However, having regard to the evidence of DW8 and the findings made by the learned judge, we are unable to accede to that argument. In our judgment, having regard to the peculiar circumstances in which the trust was formulated in the present case there was sufficient certainty in respect of the subject matter. The first issue must therefore be resolved against Fusing.

We find it now convenient to deal with the third issue, namely illegality. As we have earlier observed, the learned judge despite his appreciation of the totality of evidence came to the surprising conclusion that this was a case of a valid trust. We say this in light of the specific arguments directed by Mr Cecil Abraham in the court below as to the nature of the deceit practised by the parties upon Bank Negara. In our judgment, the present case is not one of the statutory illegality as apprehended by the learned judge. Accordingly, his reliance upon such cases as *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd & Ors* [1978] 139 CLR 410 was misplaced.

But we must say at once in fairness to the learned judge, that being a hostage to the submissions of counsel (to borrow the words of Steyn LJ, in *Darlington Borough Council v. Wiltshier Northern Ltd.* [1995] 3 All ER 895, at p. 905), he was compelled to deal with the arguments actually presented to him. Much of those arguments were on the provisions of the Banking Act 1973. What was overlooked all round was the critical point that Bank Negara, a public authority, had been deceived and that the primary object of the entire exercise was to practice such deception.

In our judgment, the present case is covered by the decision of the Court of Appeal in Singapore in *Suntoso Jacob v. Kong Liao Ming* [1986] 2 MLJ 170. In that case the plaintiff, an Indonesian, and the defendant, a Singaporean, acquired shares and became directors of a company incorporated in Singapore. Initially, the plaintiff held 190,000 shares in the company and the defendant held the remaining 10,000. In 1980, the position changed. An agreement was entered into between the parties under which the plaintiff transferred 92,000 shares to the defendant upon the express condition that the defendant would hold them on trust for the plaintiff. This scheme was resorted to in order to avoid certain administrative guidelines laid down by the registrar of ships in Singapore. Under those guidelines foreign owned ships were not registrable in Singapore. For purposes of those guidelines, the company in which a foreigner owned half or more shares was deemed to be a foreign company. Later, the plaintiff brought an action to recover the shares from the defendant. He sought to enforce the trust. Lai Kew Chai J, at first instance ([1984] 2 MLJ 1985) dismissed the action. He held that the purpose or object of the trust under which the defendant held the shares was to deceive the public administration so that the trust was illegal, void and unenforceable. On appeal, the Court of Appeal of Singapore upheld the judgment of the trial court. In dismissing the plaintiff's appeal, Thean J, who delivered the judgment of the court, after referring to the authorities relied on by counsel for the plaintiff said:

> In all three cases, the plaintiffs were not relying on the illegal agreements which they had entered into but on their rights of ownership of the properties concerned; such rights subsisted independently of the illegal agreements. In the instant case, however, the position is different. The appellant's claim is not based on any independent right of ownership of the said shares; like the father in the *Chettiar's* case (*Chettiar v. Chettiar* [1962] MLJ 143) he had transfered the property to the transferee on the understanding that the latter was to hold it on trust for him. To recover the property he has to rely on the trust created in his favour and in so doing the illegal purpose of the transfer that gave rise to the trust emerged. Even if the appellant is relying on the resulting trust of the said shares by virtue of the transfer thereof to the respondent without any payment, the unlawful purpose of the transfer cannot be ignored. It is too artificial to sever the purpose from the transaction, ie, the transfer of the said shares to the respondent without any payment, and look at only the transaction in isolation and say that it was not tainted by the unlawful purpose. The intention of the parties and the purpose of the transaction are clearly relevant. *Where a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality, and is unenforceable.* (emphasis added.)

For Eon Bank and Eon Finance in the first appeal, Mr Sandhu has argued with much cogency that we ought not to take too narrow or pedantic a view upon the policy of courts pursuant to which contracts are declared illegal and void. He submits that we ought to take a flexible approach and ought to uphold rather than to strike down such bargains as are presently before the court in these appeals. In support of his arguments, Mr Sandhu (whose submissions were adopted *in toto*) by Mr Wong Ho Leng (counsel for Eon Bank in the second appeal) has referred to decisions of the High Court of Australia in two cases. The first of these is *Fitzgerald v. L.J. Leonhardt Pty Ltd* [1997] 189 CLR 215 where Kirby J, said (at p. 249):

> It would be absurd if a trivial breach of a statutory provision constituting illegality, connected in some way with a contract or contracting parties, could be held to justify the total withdrawal of the facilities of the courts. It would be doubly absurd if the courts closed their doors to a party seeking to enforce its contractual rights without having regard to the degree of that party's transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality. Similarly, it would be absurd if a court were permitted, or required, to consider the refusal of relief without careful regard to the relationship between the prohibited conduct and the impugned contract. Thus, different considerations may exist where the contractual rights being enforced arise directly from the illegality, as distinct from those which arise only incidentally or peripherally. It is one thing for the courts to respond with understandable disfavour and reluctance to attempts to involve them and their processes in an inappropriate and unseemly way effectively in the advancement of illegality and wrong-doing. It is another to

invoke a broad rule of so-called "public policy" which slams the doors of the court in the face of a person whose illegality may be minor, technical, innocent, lacking in seriousness and wholly incidental or peripheral to a contract which that person is seeking to enforce.

The second authority that counsel cited was *Nelson v. Nelson* [1995] 184 CLR 538. He read to us the following passage in the judgment of McHugh J, (at p. 612):

If courts withhold relief because of an illegal transaction, they necessarily impose a sanction on one of the parties to that transaction, a sanction that will deprive one party of his or her property rights and effectively vest them in another person who will almost always be a willing participant in the illegality. Leaving aside cases where the statute makes rights arising out of the transaction unenforceable in all circumstances, such a sanction can only be justified if two conditions are met.

First, the sanction imposed should be proportionate to the seriousness of the illegality involved. It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. *The statute must always be the reference point for determining the seriousness of the illegality; otherwise the courts would embark on an assessment of moral turpitude independently of and potentially in conflict with the assessment made by the legislature.*

Second, the imposition of the civil sanction must further the purpose of the statute and must not impose a further sanction for the unlawful conduct if Parliament has indicated that the sanctions imposed by the statute are sufficient to deal with conduct that breaches or evades the operation of the statute and its policies. *In most cases, the statute will provide some guidance, express or inferred, as to the policy of the legislature in respect of a transaction that contravenes the statute or its purpose.* It is this policy that must guide the courts in determining, consistent with their duty not to condone or encourage breaches of the statute, what the consequences of the illegality will be. Thus, the statute may disclose an intention, explicitly or implicitly, that a transaction contrary to its terms or its policy should be unenforceable. On the other hand, the statute may inferentially disclose an intention that the only sanctions for breach of the statute or its policy are to be those specifically provided for in the legislation.

Accordingly, in my opinion, even if a case does not come within one of the four exceptions to the *Holman* dictum (per Lord Mansfield in *Holman v. Johnson* [1775] 1 Cowp. 341, at 343) to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or

> (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies. (emphasis added.)

Those parts of the foregoing passage to which we have lent emphasis demonstrate that his honour's observations were concerned with a transaction that was illegal in the sense that it was prohibited by statute. That is not, as we have earlier said, the position that obtains in the present instance.

With respect, whatever may be the position in Australia and indeed in England, following the decision of the majority of the House of Lords in *Tinsley v. Milligan* [1993] 3 All ER 65, the position here is squarely governed by s. 24 of the Contracts Act 1950. As observed by Hashim Yeop Sani, (CJ, (Malaya)) in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356:

> From the authorities, it would also seem clear that in considering illegality under the common law, the question of public policy is often considered.
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> Lord Wright in *Vita Food Products Inc v. Unus Shipping Co Ltd* [1939] 1 All ER 513 said at p. 523:
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> > Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void or in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.
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> That is the position in common law. But the courts in this country are bound by the statutory provisions of our Contracts Act 1950.
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> The provisions of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; para (b) deals with what could defeat the object of any law; and para (e) deals with public policy.
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> Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also one of the majority judgments in *Government of Malaysia v. Lim Kit Siang* at p. 40.

> The provisions of s. 24 of our Contracts Act 1950 is a statutory direction. It may well have originated from some old common law principle but that principle has now been converted into a statutory provision. We are therefore unable to accept the submission of Mr Puthucheary that we follow what he termed as the 'trend' shown by the courts in common law countries to be slow in striking down illegal contracts because that contention is untenable on the face of the statute law of this country.
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> Paragraphs (a), (b) and (e) of s. 24 of the Contracts Act 1950 should be read disjunctively. Section 24 of the Contracts Act 1950 is explicit in that if an agreement is forbidden by law or prohibited by law or of such nature that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such nature that it would defeat the law then the question of public policy does not arise at all. The question of public policy arises only in para (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.

Now although so much of the judgment in the *Chung Khiaw* case as relates to s. 67 of the Companies Act 1965 has been reversed by the judgment of the Federal Court in *Lori (M) Bhd v. Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81, we are unable to detect any overruling of the passages we have quoted a moment ago. The views upon the principles of illegality operating under s. 24 of our Contracts Act as expressed by the Chief Justice of Malaya on that occasion continue to be good law.

Even in England, recovery of property held under equitable title is permitted where illegality has not to be resorted to, to establish title: *Tinsley v. Milligan (supra).*

In the present case, Fusing's position is, we apprehend, adequately covered by the decision of the Privy Council in *Amar Singh v. Kulubya* [1964] AC 142 where (at p. 151), Lord Morris of Borth-Y-Gest said of the plaintiff in that case:

> At the time of the trial, however he was not basing his claim 'on the said agreements'. Indeed, he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreement in his plaint. He required no aid from the illegal transactions in order to establish his case. (Compare *Simpson v. Bloss* [1816] 129 ER 99). *It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant, who was a non-African, was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was, however, in spite of and not because of those illegal agreements that he was entitled to possession.* (emphasis added.)

So too here.

Fusing does not have to rely upon its complicity in the illegal transaction to establish title. It is already the registered proprietor. It is asserting that registered proprietorship. That is why it is asking for vacant possession. Even if it has set out particulars of the illegal arrangement in its pleading, it matters not a jot. Its claim is not founded upon the illegal arrangement.

Although Mr Abraham sought initially to argue that Fusing may not be in *pari delicto,* he did not seek to sustain his position. In fairness to him, he frankly conceded that the principal officers of Fusing at the material time, as found by the judge, had played a full role in implementing the scheme, to deceive Bank Negara.

We do not think the position could be otherwise. Fusing as a limited company has no mind of its own. It must rely upon its officers to carry out its business and affairs. As Denning LJ, (as he then was) said in *HL Bolton v. T Graham* [1957] 1 QB 159 at p. 172:

> A company may in many ways be likened to a human body. It has brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.

In the present case, the actings of Fusing's former directors constitute its knowledge. But on the facts before us, that is neither here nor there. That is because, as we have already said, Fusing is not relying on an illegal transaction to mount its claim. Viewed from any proper perspective, the trust in the present case is hopelessly bad. It was illegal from the very start.

To make matters worse, we have been told that both Eon Bank and Eon Finance have written off the purported loans. No security has ever been taken for the so-called loans. The situation is certainly most unsatisfactory. Our attention has been drawn to a document, purportedly an adjudication by Bank Negara that supposedly purifies the sins already committed by Eon Bank and Eon Finance. This is quite an intolerable state of affairs. The ultimate authority to decide the issue of illegality are the courts and it is a matter of regret that the situation that we are now faced with has been permitted.

For the reasons we have given thus far, we find it unnecessary to make any findings on the Statute of Frauds point. But we will say this, in deference to the thorough research upon the subject that Mr Wong Ho Leng has taken in preparing his submissions to us. In our view the point is squarely covered by the Federal Court in *Brown & Root (Labuan) Sdn Bhd v. Pada Sdn Bhd* [1987] 1 CLJ 229; [1987] 1 MLJ 239 where in the opening paragraph of his judgment, Lee Hun Ho J said:

> The appellants appealed against the decision of the learned judge in that he considered the equitable principles of unjust enrichment and constructive trust to be irrelevant. In the course or argument we referred appellants to the case of *Lee Phek Choo v. Ang Guan Yau*. Although this is a Sarawak case the law in Sabah is the same as in Sarawak as regards the applicability of the Statute of Frauds. Accordingly, the appellants abandoned his ground on constructive trust.

However in view of the fact that we have decided this case upon the point of illegality, the Statute of Frauds point is purely academic and is a non issue.

For the reasons already given, the first appeal must be allowed and the respondents' counterclaim dismissed with costs. The second appeal is dismissed with costs and the respondents' cross appeal is allowed. The dismissal of the counterclaim in the second appeal is upheld. The costs of the first appeal must be borne by the respondents. The costs in the second appeal will go to the respondent in the second appeal. The deposit in the first appeal is refunded to the appellant. The deposit in the second appeal is to be paid out to the respondent in that appeal to account of its taxed costs. There are some consequential orders in respect of the first appeal that we will now make.